

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

ROYAL CREST DAIRY, INC.

Employer,

and

Case 27-RC-8286

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL NO. 7, AFL-CIO,

Petitioner.

DECISION AND DIRECTION OF ELECTION

On October 23, 2003, United Food and Commercial Workers Union, Local No. 7, AFL-CIO, filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent certain employees employed in administrative offices of the Employer. Barbara D. Josserand, a hearing officer of the National Labor Relations Board, conducted a hearing on November 12 and 13, 2003. Following the hearing, the parties filed briefs.

The issues to be resolved in this case relate to the appropriate composition of the unit and the supervisory status of one individual. The Petitioner seeks to only represent the customer service representatives in the customer service department. The Employer contends that, because of the similarity in terms and conditions of employees and significant interaction in the performance of their job functions, the petitioned-for unit is not appropriate and that the only appropriate unit must include the account services department employees and the route accounting/utility department employees.

Contrary to the Petitioner, the Employer further contends that customer service supervisor Megan Excell-Belten, while nominally bearing the title “supervisor,” does not possess or exercise Section 2(11) supervisory indicia and should be included in the unit.

I conclude for the reasons enunciated below that the petitioned-for unit is not appropriate and that the only appropriate unit must include the office clerical employees in all three departments. This decision is based on well-settled Board law that a unit limited to only a segment of office clerical employees is inappropriate. See e.g., **Aurora Fast Freight**, 324 NLRB 20 (1997). Further, for the reasons set forth below, I decline to decide the supervisory status of Excell-Belten and will allow her to vote under challenge.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, I find that the Employer is a Colorado corporation with its corporate headquarters located in Denver, Colorado. The Employer is engaged in the wholesale and retail distribution of dairy products in various Colorado cities, including the Denver and Colorado Springs metropolitan areas. With regard to the Employer’s retail operations, the record establishes that it operates nine convenience store/gas stations in the Denver metropolitan area that operate under the name Farm

Crest Dairy Stores. During the past twelve months, the Employer derived gross revenues valued in excess of \$500,000 and purchased and received at its Colorado facilities goods or materials valued in excess of \$5,000 directly from points and places located outside the State of Colorado.

3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following unit of employees:¹

INCLUDED: All fulltime and regular parttime office clerical employees in the customer service department, account services department, and route accounting/utility department employed at the Employer's Denver, Colorado administrative office.

EXCLUDED: Guards, supervisors as defined by the Act, and all other employees.

STATEMENT OF THE CASE

A. Background:

The Employer operates a multi-facility dairy and retail convenience store operation from its administrative offices located in Denver, Colorado. The employees at issue herein all work in the administrative office located at 350 S. Pearl Street, Denver, Colorado.

¹ At the hearing, the Petitioner expressed its willingness to proceed to an election in any unit found appropriate.

The Petitioner seeks to represent a unit described as: “included: Customer Service Clerks and all the non-confidential office clerical employees; excluded: all other employees, guards, confidential clerical employees and supervisor as defined by the Act.” Notwithstanding this unit description, the record is clear that the Petitioner seeks to represent only the customer service department employees, and it specifically seeks to exclude the account services department employees and the route accounting/utility department employees from the unit determined to be appropriate, even though both classifications are office clerical employees not asserted by the Petitioner to be confidential employees. The Petitioner also does not identify any other “non-confidential office clerical employees” whom it would include with the customer service representatives. Thus, while the Petitioner frames its unit description as including “all non-confidential office clericals,” in fact, it seeks to exclude a portion of the office clerical staff.

B. Organizational Structure

Steve Chapman, vice president of the Employer, has oversight for the three departments at issue. Corporate Office Manager Melissa Winholtz reports to Chapman and has direct responsibility for these three departments. Reporting directly to Winholtz are Trish Ratliff, the customer service manager;² Ann Stout, account services department supervisor; and Cindy Manning, accounting/utility department supervisor. Stout oversees the work performed by the six other account services department employees. Manning oversees the work performed by the three other accounting/utility department employees. Ratliff manages the customer service department. Reporting

² The parties stipulated that Winholtz and Ratliff are statutory supervisors on the basis that they have and exercise the authority to hire, fire and discipline employees. Since the record supports that stipulation, I shall exclude them from the unit.

directly to Ratliff are the customer service supervisor, Megan Excell-Belten and the 13 customer service representatives (CSRs) whom the Petitioner seeks to represent.

The employees in the customer service, account service, and route accounting/utility departments work in cubicles within larger office spaces. The CSR area is directly adjacent to the main building entrance. It consists of a front counter for walk-in customers with two adjacent desks for the CSRs primarily responsible for responding to walk-in customers. Behind those desks are a series of cubicles with several desks in each for the other CSRs. Excell-Belten has her own partial cubicle in the middle of the CSR area. A hallway leads out of the back of the CSR area. Ratliff's office is on the left side of that hallway, separated from the CSR area by a copy room used by all the employees at issue in this matter. Adjacent to Ratliff's office are the route accounting/utility area and account services area, respectively. Just beyond the account services area at the end of the hallway is the break room used by employees from all three departments.

All of the CSRs, account services, and route accounting/utility employees are paid hourly, starting at \$9.50 per hour, and ranging upward based on longevity and responsibilities. All employees at issue receive identical benefits and are eligible to participate in bonus programs designed for their specific department. A bilingual CSR employee also receives \$25 extra per pay period for handling all Spanish-speaking customers for the CSR and account services departments.

With regard to the bonus programs, the CSRs participate in a program for which they earn bonuses for "saving stops", which involves talking customers who were going to cancel delivery into not canceling. The utility employees are eligible to

participate in the bonus program within the department in which they are currently assigned to work. Thus, two route accounting/utility employees participated in the CSR bonus program during the second quarter, because they were assigned utility functions in the CSR department. The account services department has similar bonus programs for new customers obtained and collection of bad debts. The route accounting/utility employees also have a bonus promotion program based on account audits.

CSRs and route accounting/utility employees are scheduled to work varying shifts between 6:30 a.m. and 4:00 p.m. Monday through Friday to be available when delivery problems are most likely to occur. The account services employees work primarily from 6:30 a.m. to 3:00 p.m., but one of the employees works daily until 6:00 p.m., and another works until 7:30 p.m. two days per week and until 6:30 p.m. the other three days to enable them to facilitate reaching customers in the evening in regard to account collections issues.

C. Customer Service Representatives

The customer service department is responsible for taking all incoming calls from customers and placing some outbound calls to dairy route drivers relating to product deliveries. The primary function of the customer service department is to take care of customer needs concerning starting up or stopping delivery services, issues regarding missing product, and billing discrepancies or delinquencies. All of the CSRs work on computer terminals that allow them to access customer accounts. They spend the majority of their day on the telephone speaking to customers and either entering appropriate data into the computer system or manually filling out forms related to

customer calls. The CSRs each have their own desk and filing cabinet located in cubicles throughout the customer service area.

As noted above, there are 13 employees classified as CSRs. One of these employees is referred to as the “on-line web coordinator.” The on-line web coordinator CSR handles the on-line customer requests for resolution of account status issues, special orders, changes in standing orders, requests to skip orders, requests by new customers for free samples, and general customer comments or suggestions. This CSR uses a personal computer in addition to the computer terminal used by the other CSRs. She prints out the e-mail requests and then inputs them into the computer system for the appropriate department to fulfill. The on-line web coordinator CSR also assists walk-in customers at the customer service front counter with the same types of issues.

The remaining CSRs spend their workday taking incoming calls and performing the clerical duties associated with those calls. Customers may call for regular maintenance on their account, request a temporary or permanent order change, or request a special item for delivery. These types of calls are handled immediately by the CSRs while the customer waits on the telephone. The CSRs also complete new customer applications with customers on the phone. This form is done in triplicate, with the CSR department maintaining one copy and turning in the other two copies for approval by the account services department. After receiving the form from the CSR department, the account services department employees input the information into the computer system, run a credit check, and review the credit on each customer before a new account is established. CSRs receive about 25-35 new customer calls each day.

CSRs also receive telephone calls from customers with problems related to failure to make timely payments. While account services is the department responsible for collections of overdue customer bills, and that department generates collections letters on a monthly basis, CSRs handle the in-coming customer telephone calls in response to such collections letters. The collections letters fall into three categories, including friendly reminders of over due bills, threats to close the account if payment is not forthcoming, and notifications that the account has been closed. The category of the letter is noted on the customer's account by account services employees, so the CSRs are alerted to the status. The customer service department also receives a schedule of when the collections letters are being sent out by the account services department and what type of letter is being sent, so the CSRs can anticipate the calls they are likely to receive. Because CSRs have only limited computer access to information in customer accounts, the CSRs regularly contact account services employees by telephone to obtain restricted information about the account status for the customer. In some instances, the CSRs actually transfer the call to account services employees, in others, the CSRs simply relay the information to the customer.

The CSRs cannot resolve credit issues, but they can take payments over the phone. Specifically, CSRs accept electronic draft authorization and credit card payments over the phone. If the call involves a credit issue, the CSR generally transfers the call to the accounts services department. The CSRs also complete an initial credit application form for customers before turning it over to the account service department for processing.

CSRs also transfer customer accounts when customers move from one location to the next. The CSRs enter the request into the system to get a particular account transferred, and the account service department handles that request thereafter. These transfers must be done by a certain time of day or it will affect the customer's next day delivery. If the call comes in after the deadline, the CSR contacts an account services employee to get their assistance to avoid disruption in service.

As calls come in, CSRs generate notes on accounts, which are printed four times a day and taken back physically to the account services department for review. The customer service department maintains a stop log on a daily basis, which is faxed to the appropriate departments so that customers can be contacted before their account is actually stopped. CSRs also route returned mail to the appropriate department.

D. Account Services Department

There are six employees in the account services department. Ann Stout, who has held the title of account services supervisor for five years, reports departmental activities directly to corporate office manager Melissa Winholtz.³ Like the CSRs, the account services employees work at desks, in cubicles, using computer terminals and telephones as their primary work tools. Stout and the account services employees have responsibilities for processing the new customer applications generated by salesmen, route drivers, and the CSRs.

The duties of account services department employees include entering the application information into the computer system on a daily basis and processing the credit checks. The account services employees also make telephone calls to

³ The supervisory status of Stout was not litigated at the hearing and I shall allow her to vote subject to challenge.

customers regarding delinquencies on their accounts, and they send out the three phases of written correspondence discussed above. If account services employees fail to reach the customer directly, they leave a message for the customer to call in on the CSR line, not their own telephone line. Account services employees take in-coming calls initially handled by CSRs only if the CSR is not able to get a payment or otherwise resolve the issue. CSRs communicate by telephone with account services employees about these types of delinquency calls several times an hour. This process involves CSRs getting information from the customer about the delinquency and assessing whether the CSR can resolve the situation by taking a credit card or debit transfer payment. If not, the CSR contacts an account services employee and explains the situation. The two employees then determine whether the CSR can relay information back to the customer or whether the call should be transferred to the account services employee. Account services employees also process route changes for customers that have been generated by CSRs and drivers, process returned checks, and process electronic debit authorizations and credit card payments generated by other account services employees and by CSRs. The account services employees also decide when an account needs to be written off and generate so-called “write-off” reports.

At the end of the day, one of the account services employees runs the “new-start” report, which is given to the CSRs who make calls to the new customers the day following first delivery. The CSRs inquire as to how the first delivery went and whether there are any issues to be resolved. The account services employee who runs the new start report also handles phone calls transferred from CSRs concerning problems with the first delivery.

Finally, two of the account services department employees are trained to work as CSRs and occasionally do so when the customer service department is shorthanded. This has not happened since about May because the CSR department began using temporary employees and recently increased its staff through direct hires.

E. Routing Accounts/Utility department

Cindy Manning is the route accounting/utility supervisor. She has held this position for about two years. Prior to that, she worked as a utility employee. Manning, like Stout, reports directly to Winholtz⁴. The route accounting/utility department consists of Manning and three other employees. These employees also use computer terminals as their primary work tool and the two “utility” employees actually work directly in the other two departments most if not all the time. This department oversees the dairy product inventory enabling the CSRs and drivers to obtain current information about product availability for customers. The route accounting function also includes processing wholesale customer orders.

One of the four routing accounts/utility employees, Katrina (whose last name is not provided in the record), is classified as a utility employee. She is assigned to specifically work in the CSR and account services departments to fill in wherever needed for heavy work volume, breaks and lunches, and leaves of absence. When working in those departments, Katrina performs the same duties as the regular departmental employees. When Katrina is not actually performing CSR or account services duties, she is primarily responsible for making the daily new-customer calls discussed above. Katrina also handles refunds for customers who have stopped their

⁴ The supervisory status of Manning was not litigated at the hearing and I shall allow her to vote subject to challenge.

services, schedules deliveries for customers on days other than their regularly scheduled delivery day, makes adjustments on accounts for gift-certificate customers, and handles accounts for customers with multiple accounts. Finally, Katrina interacts with accounts services on reactivating customer accounts for customers whose accounts have gone inactive for some reason. This interaction occurs about seven to ten times a day.

Kay (whose last name is also not provided in the record) is classified as the utility data clerk. She works at a desk in the CSR area posting cash, credit card, and debit payments received in the mail or from CSRs and account services employees. Kay also sorts and distributes in-coming mail, including the returned checks processed by account services employees. Since Kay maintains records of all payments that are processed, CSRs and account services employees regularly interact with her regarding the status of payments when dealing with customers.

Christina (whose last name is also not disclosed on the record) is classified as the route accounting clerk. She oversees the Denver dairy branch inventory and processes all the wholesale orders for delivery. She interacts by telephone with customers and drivers and with CSRs when they have customer calls that relate to product availability.

ANALYSIS

Unit Determination:

As the Petitioner correctly asserts, the Board has long held that a unit need not be the only appropriate or even most appropriate unit, but merely an appropriate unit.

Overnite Transportation Co., 322 NLRB 723 (1996); **Hamilton Test Systems**, 265 NLRB 595 (1982). However, while a petitioner's desire as to the unit is always a relevant consideration, it cannot be dispositive where, as here, the Petitioner is seeking a unit based on arbitrary groupings of employees. **Florida Casino Cruises**, 322 NLRB No. 155 (1997); **Arco Inc.**, 273 NLRB 348 (1984).

In **Aurora Fast Freight, Inc.**, 324 NLRB 20 (1997), the Board confirmed its general policy "that a segment of an employer's office clerical employees is not an appropriate unit. **Bank of America**, 174 NLRB 101 (1969)." This same principle was previously advanced in **South Carolina Electric**, 243 NLRB 388, fn 3 (1979), where the Board, citing **California Physicians' Services, d/b/a California Blue Shield**, 178 NLRB 716 (1969), stated: "Moreover, the unit described in the Regional Director's decision, which includes downstairs clerks but excludes, inter alia, 'all other office clerical employees' is inappropriate on its face." These cases do not turn on the traditional community of interests analysis urged by the Petitioner, but on whether the employees sought to be excluded "share a community of interest sufficiently separate from" the employees sought by the Petitioner. See e.g., **South Carolina Electric**, *supra* at 389.

Turning to the facts presented by this case, I conclude that it would be inappropriate to direct an election in the petitioned-for unit, because the proposed unit carves out a portion of the Employer's office clerical staff employees, while leaving out other office clerical employees who perform similar work in identical working conditions, interact regularly in the performance of their job duties, have comparable wage rates, and enjoy the same benefits. Thus, I conclude that the Petitioner has failed to meet its

burden of establishing a “sufficiently separate” community of interests among the three departments of office clerical employees. In this regard, the account services employees and accounts/utilities employees, like the CSRs, perform traditional office clerical work, utilize identical office equipment, work in the same general office area, and interact regularly with each other because of the overlap in their functions. Accordingly, it would be inappropriate to exclude the account services and route services/utility employees merely because the Petitioner does not seek to represent them.

There are approximately 25 employees in the unit found appropriate.

Supervisory status of Megan Excell-Belten

In **NLRB v. Kentucky River Community Care**, 532 U.S. 706 (2001), the Supreme Court affirmed the Board's long-standing holdings that place the burden of proving supervisory status upon the party who claims that such status exists. *Id.* at 710-712. Without belaboring this decision with a recitation of the evidence bearing on the supervisory status of Excell-Belten, I conclude that the record evidence is insufficient to make a finding of supervisory status one way or the other. While, under **Kentucky River** the party asserting supervisory status bears the burden, I take administrative notice of the fact that unfair labor practice charges⁵ filed against the Employer are currently under investigation by the Regional Office and the supervisory status of Excell-Belten is critical to the resolution of those charges. As the burden for fully investigating unfair labor practice charges rests with the Regional Director, I have determined to preserve the question of the supervisory status of Excell-Belten for consideration in the

⁵ Case numbers 27-CA-18785, 18786, 18843, 18844, 18853, 18860 and 18861.

unfair labor practice proceedings and I shall allow her to vote subject to challenge in the election in this matter.

Direction of Election

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.⁶ Eligible to vote are those in the Unit as described above who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated

⁶ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL NO. 7, AFL-CIO

List of Voters⁷

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. **Excelsior Underwear Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Co.**, 394 U.S. 759 (1969); **North Macon Health Care Facility**, 315 NLRB 359 (1994). Accordingly it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433 on or before **December 16, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

⁷ Based on an administrative showing of interest check, I have determined that the Petitioner has provided a sufficient showing of interest in the larger unit.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. The Board in Washington must receive this request by **December 23, 2003**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 9th day of December 2003.

B. Allan Benson, Regional Director
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